Supreme Court, U.S.
FILED
DEC 1 - 2003
OFFICE OF THE CLERK

No. 03-549

In The
Supreme Court of the United States
October Term, 2003

TOP RANK, INC.,

Petitioner,

v.

FLORIDA STATE BOXING COMMISSION, et al.,

Respondents.

On Petition For A Writ of Certiorari To The District Court of Appeal, First District, State of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(Restated)

Whether a state tax imposed on a boxing promoter's sale or lease of broadcasting rights to a boxing match is facially invalid under the First Amendment as a content-based restriction on speech.

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STATEMENT OF THE CASE

The State of Florida imposes a 5 percent gross receipts tax on promoters of boxing matches. Gross receipts include, inter alia, "[t]he gross price charged for the sale of broadcasting, television and motion picture rights" for a boxing match, and the tax may not exceed $40,000 for any single event. § 548.06, Fla. Stat. (2000). A promoter is defined as "any person . . . who produces, arranges, or stages any match involving a professional." § 548.002(15), Fla. Stat. (2000).

With but one exception, a taxpayer subject to a Florida tax who desires to contest its tax liability must pay the tax and seek a refund through the administrative proceeding prescribed by § 215.26, Fla. Stat. The administrative decision may be reviewed by the courts. Id. The single, narrow exception to this requirement occurs when the taxpayer contends the tax statute is facially unconstitutional. In that event, the taxpayer may file an action directly in circuit court.[1] Petitioner Top Rank, a licensed promoter, elected not to pursue the available administrative remedy. Instead, it sued the Florida State Boxing Commission and other state defendants, contending that § 548.06, Fla. Stat., was unconstitutional and seeking declaratory and injunctive relief and a refund of taxes paid on four out-of-state matches. Top Rank asserted that the tax was an impermissible content-based financial burden and facially invalid under the First Amendment. Neither Top Rank nor the other two plaintiffs

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[1] Sarnoff v. Dep't of Highway Safety & Motor Vehicles, 825 So. 2d 351, 357 (Fla. 2002) ("We therefore hold that the direct-file exception created by this Court in Nemeth and Kuhnlein is available only when a taxpayer is seeking a refund pursuant to section 215.26, and the sole basis claimed for the refund is that the statute imposing the tax or fee is facially unconstitutional.")

contended the tax violated the Commerce Clause or Due Process Clause with respect to boxing matches held outside Florida.[2]

The trial court granted summary judgment in favor of the state defendants, finding the statute facially valid. It held that § 548.06(1)(a) simply imposed a gross receipts tax "on the sale of the intangible right to broadcast or televise a boxing event," and applied to promoters only when they chose "to sell or lease their rights to broadcast or televise boxing events." Pet. App. 4a. Further, "[t]he purchaser of the rights from the promoter is not taxed under Section 548.06, nor are the use or uses of the rights to broadcast after the initial sale by the promoter." Id. Accordingly, the trial court declared § 548.06 "facially valid" under the First Amendment. Id. It also dismissed Showtime for lack of standing.

All three plaintiffs appealed to the First District Court of Appeal and again urged that § 548.06 was facially invalid. As stated in their initial brief, the two issues presented on appeal were:

> I. The Pay-Per-View Boxing Tax Is Unconstitutional Because It Is Content-Based.
>
> II. Showtime Has Standing.

Initial Brief, p. i.[3] In the argument, the brief asserted that "it is clear from the statute itself that the tax is imposed on speech

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[2]Top Rank was joined by America Presents, Ltd., and Showtime Networks, Inc. Showtime has filed a response in support of the petition for certiorari, in part duplicating the arguments of Top Rank but also presenting different questions and attempting to raise Commerce Clause and Due Process issues. Supreme Court Rule 12.6 does not permit Showtime to add issues.

[3]These were the two issues stated in the table of contents to the initial brief, as required by Rule 9.210(b)(1), Fla. R. App. P.

solely because of its content, and not as a result of any facts peculiar to these Appellants, and this is the heart of Appellants' facial challenge." Initial Brief, p. 15.[4]

The First District Court of Appeal affirmed the judgment of the trial court and the dismissal of Showtime. The First District rejected Top Rank's reliance on United States Satellite Broadcasting Co. v. Lynch, 41 F. Supp. 2d 1113 (E.D. Cal. 1999), Showtime Networks, Inc., v. Georgia State Boxing Comm'n, No. 1999CV-04184 (Ga. Super. Ct. Nov. 23, 1999), and TVKO v. Howland, 15 Or. Tax 335, aff'd, 73 P.3d 905 (Or. 2003). The court found these three cases did not involve taxation of a boxing promoter. Rather, the tax was imposed directly against the broadcaster, the cable television programmer Showtime or, in the Oregon case, the person who held the distribution rights to a pay-per-view telecast. Holding the

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[4]All plaintiffs insisted throughout the trial court proceedings that they were presenting only a facial challenge to § 548.06, and opposed defendants' efforts to undertake discovery as unnecessary. They cited Department of Revenue v. Florida Home Builders Ass'n., 564 So. 2d 173 (Fla. App. 1st Dist. 1990), as controlling authority on the nature of a facial challenge, arguing that:

> A facial challenge is one where the statute or regulation "could not be constitutionally applied to any factual situation;" an as-applied challenge is one where the statute or regulation at issue is "unconstitutional as applied to [a] particular situation."

Plaintiffs' Memorandum In Opposition to Defendants' Motion to Compel Discovery and Other Relief, p. 4 (emphasis in original). See id. at 2 ("Plaintiffs' First Amendment action is a facial constitutional challenge; discovery is not necessary to determine whether the challenged provisions, on their face, are unconstitutional") (emphasis in original).

Florida law did not on its face apply to distributors of boxing matches to cable networks, the First District found no error in the dismissal of Showtime. Pet App. 8a-9a.

The First District also found inapposite Top Rank's reliance on Simon & Schuster, Inc. v. New York State Crime Victim's Bd., 502 U.S. 105 (1991). The court first acknowledged that Simon & Schuster did not support a distinction between an author and an "entity" who contracted to transmit the author's speech. As that decision held, each is entitled to First Amendment protections. Pet. App. 11a. However, the Simon & Shuster decision did not control this case because the gross receipts tax is imposed on the boxing promoter, who is not a member of the media, and because "the act of boxing does not involve either pure or symbolic speech." Pet. App. 12a. Canvassing federal case law, the court found no support for the contention that boxing involved either pure or symbolic speech protected by the First Amendment. Finally, the court rejected the argument that because the amount assessed is based on direct receipts of the broadcast, it was an impermissible tax on the cable distributors.[5] The tax was imposed on the privilege of promoting the match, which is not protected by the First Amendment. Id.

Top Rank now presents itself to this Court not only as a promoter of boxing matches, but also a producer of television programming. Top Rank asserts that "in its role as promoter and producer" it performs "many functions that are comparable to those of a motion picture producer." Pet. 4. It describes various actions it purportedly undertakes in this capacity and asserts that the telecast of a boxing match it promotes and

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[5]See Fla. Admin. Code Rule 61K1-1.042(6) (5 percent gross receipts tax is based on total number of pay-per-view orders sold in Florida as reported by cable system operators, exclusive of state and federal sales tax, and paid by promoter). Pet. App. 30a.

produces is a news event in itself. Pet. 5-6. However, the single affidavit on which it relies states that "Top Rank licensed cable television programmers, such as home Box Office and TVKO, divisions of Time Warner Entertainment Company, L.P., to produce and distribute these pay-per-view television programs." Affidavit of Robert Arum, ¶ 4. The affidavit then describes a few activities Top Rank undertakes to enhance the appeal of the program. Top Rank did not even refer to this affidavit in the hearing on the motion for summary judgment, but merely asserted it was "involved in telecasts." See Transcript at 39.

This attempt to refocus its case is significant because Top Rank now contends that the First District failed in its assessment of the facts. In considering whether the tax burdened protected expressive activity, Top Rank asserts that the First District failed to take into account "whether the boxing program produced and promoted by Top Rank for pay-per-view television distribution constitutes protected speech," and examined instead whether boxing involved pure or symbolic speech. Pet. 10 (emphasis added). In fact, neither of the courts below explored whether Top Rank was a producer of news-like television programs or cable programming, as well as a promoter. Such facts were not relevant to the facial challenge presented, and Top Rank denied in its appellate brief that its challenge was based on any facts peculiar to it.

As shown, Florida law precludes an as-applied challenge to the constitutionality of a tax statute or a challenge to the constitutionality of an administrative rule prior to compliance with § 215.26, Fla. Stat. Necessarily then, the trial court and the First District had only to decide the facial validity of a tax imposed on the promoter of a boxing event in the manner prescribed by § 548.06. That is the only issue that Top Rank may present to this Court.

REASONS FOR DENYING REVIEW

Top Rank's petition is an as-applied challenge to § 548.06, Fla. Stat., based on factual contentions not cognizable in a facial challenge.

The First District Court of Appeal correctly decided that the portion of the gross receipts tax imposed on the sale or lease of broadcasting rights by a boxing promoter was not facially invalid under the First Amendment. Accordingly, review should be denied.

I. THE TAX ON THE SALE OR LEASE OF BROADCASTING RIGHTS IS NOT FACIALLY UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT.

A. Petitioner's Argument Is Premised On Factual Assertions Not Properly Before The Court.

The premise of Top Rank's argument is that the tax at issue is **i)** imposed on pay-per-view television programming, and **ii)** "shouldered entirely by a small handful of producers of television programs," among which it counts itself. Pet. 10-11. While the first representation is refuted by the plain language of the statute, the second attempts to posture Top Rank as not only a promoter of boxing matches but a member of the media and a producer of television programs. By such sleight of hand, Top Rank apparently seeks to transform what should be a facial challenge to § 548.06 into one that is as-applied. The question implicit in its argument is whether the tax can be imposed on a member of the media engaged in producing a "newsworthy event" that is "independent of the underlying boxing match." Pet. at 6, 10-11.

That is not, however, the issue that was presented to or decided by the two Florida courts. Their decisions addressed

promoters who were neither found nor assumed to be members of the media producing "newsworthy events." See Pet. App. at 12a ("In the instant case we are not dealing with taxation of a member of the media.") Indeed, a challenge to the facial validity of § 548.06 must assume that some promoters are not so engaged because under Florida (and federal) case law a facial challenge postulates, as Top Rank emphatically insisted to the trial court, supra n. 4, that the statute is invalid in all circumstances. State v. Bales, 343 So. 2d 9, 11 (Fla. 1977); Department of Revenue v. Florida Home Builders Ass'n, 564 So. 2d 173, 175 (Fla. App. 1st Dist. 1990). See also United States v. Salerno, 481 U.S. 739, 745 (1987). Because Top Rank's claim to be a producer of programming as well as a promoter was not cognizable in the proceedings below, it may not present itself as a producer of television programming in this Court.[6]

Even assuming Top Rank acts to some extent as a producer, that alone cannot sustain a facial challenge. The evidence as to what Top Rank does as a producer of television programming is scanty at best, and Top Rank's admission that its facial challenge did not depend on facts peculiar to it tacitly acknowledged the

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[6]It is not this Court's practice to accept a case for review where the petitioner's federal claims were not properly presented to the state court below:

> With 'very rare exceptions,' . . . we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.

Campbell v. Louisiana, 523 U.S. 392, 403 (1998), quoting Adams v. Robertson, 520 U.S. 83, 86 (1997) (per curiam) (in relevant part refusing to address the issue of petitioner's "fair-cross-section claim" because petitioner failed to show the issue was properly presented to the Louisiana appellate courts); see also Heath v. Alabama, 474 U.S. 82, 87 (1985); Illinois v. Gates, 462 U.S. 213, 218 (1983); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940).

irrelevance of such evidence. Top Rank, moreover, made no attempt to show that all promoters of boxing matches are also producers of television programming.[7]

Although Top Rank maintains that the tax squarely implicates the First Amendment, it offers only an as-applied argument that was foreclosed by its choice of remedies under Florida law. It now contends that any distinction between Top Rank and cable television operators is without First Amendment significance because Top Rank is not just a promoter under § 548.06, but also functions as a producer of boxing pay-per-view programming. Thus it concludes that "the relevant question is not what Florida calls Top Rank, but rather whether Top Rank's activities are protected by the First Amendment." Pet. 16. The problem, however, is not that Florida has "unilaterally characterized" Top Rank as a promoter, nor is it that the First District failed to address Top Rank's claimed activities. Top Rank's decision to pursue a facial challenge to § 548.06 under Florida law did not allow for consideration of facts peculiar to it, as its brief to the First District acknowledged. The as-applied argument now made should have been brought in the administrative proceeding authorized under § 215.26, Fla. Stat.

Top Rank alternatively asserts that even if it has no "distinct speech interest of its own," it still has a role as producer and licensor in the ultimate transmission of cable programming, and therefore the Court's decision in Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105 (1991), controls. But the affected parties in Simon & Schuster were clearly speakers. In that case, Simon & Schuster had contracted with

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[7]Further diminishing its claim to a facial challenge, Top Rank has abandoned the contention that a tax on a promoter based on a match held in Florida would violate the First Amendment. Although it took that position before the First District, see Reply Brief at 9, it asserts the only issue before this Court is the tax imposed on matches held outside Florida that are viewed in the state. Pet. at 2.

Henry Hill to publish his book and was thus "by definition a medium of communication." Id. at 117. Each had speech interests that were undoubtedly entitled to some degree of First Amendment protection and the decision turned on whether New York's Son-of-Sam statute was narrowly tailored to serve a compelling state interest. The nature of Top Rank's speech interest as producer and licensor in the transmission of cable programming has never been an issue in this facial challenge, was not explored by the lower courts, and was not the subject of their rulings.

B. The Tax Is Not An Impermissible Content-Based Restriction On Speech.

Because the First District properly did not find--or assume--that Top Rank was itself a producer of television programming or member of the media, it had only to decide whether a boxing promoter's mere sale or lease of broadcasting rights to a boxing match was entitled to First Amendment protection. Its conclusion that boxing conveys no particularized message and is neither pure speech nor symbolic speech is clearly consistent with this Court's precedents. See Texas v. Johnson, 491 U.S. 397, 404 (1989) ("In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great the message would be understood by those who viewed it.") (quoting Spence v. Washington, 418 U.S. 405, 410-411 (1974). See also United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

A boxer, when performing, is not a speaker. Top Rank does not even argue that boxing is speech. A promoter of a boxing match, as defined by Florida law, is not a speaker but one who

sells to another the right to create a television program. Although the creation of the program might conceivably involve the match promoter in enhancing the television production, nothing in the record indicates that is always the case for all promoters. Hence, the sale of the right to broadcast a boxing match cannot be held to violate the First Amendment in all cases.

Top Rank's contention that § 548.06 is fatally content-based plainly fails when the sale or lease that is taxed does not involve protected expression. As explained in Leathers v. Medlock, 499 U.S. 439, 448-449 (1991), the danger from a tax scheme that targets a small number of speakers or is content-based is that it will distort the market for ideas. Because no speaker is targeted and because boxing does not involve the expression of a particular idea or point of view, the tax here does not serve to censor any idea or distort the market for ideas. See Leathers v. Medlock, 499 U.S. 439, 448-449 (1991). Top Rank does not explain what idea is endangered.

Top Rank does argue that the reasoning of the First District would sustain the Son-of-Sam law at issue in Simon & Schuster because criminal activity is not pure or symbolic speech. But the Simon & Schuster decision did not turn on the nature of Henry Hill's activity. Henry Hill wrote a book reflecting on his life in crime, speech in its purest form. In relevant part, the decision states that "[t]he government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker." 502 U.S. at 117 (emphasis added). Under the Florida statute a promoter is only one who sells the right to broadcast an event that itself is not speech. Top Rank is not Henry Hill, nor is it Simon & Schuster. For purposes of this case it must be assumed that content and commentary are added by the producer of the television program, not the promoter of the match. The argument thus fails because Top Rank's facial challenge cannot be premised on the factual contention that a particular match promoter also happens to be a producer of television programming. The First District rightly did not

address that possibility. That is another case which must be resolved at another time on a properly developed record.

Top Rank also argues that there can be no tax if there is no broadcast, that broadcast rights therefore cannot be separated from the broadcast, and thus the tax must be on the broadcast. This flawed syllogism establishes nothing of constitutional significance. The tax is paid by the promoter, not the broadcaster, and in amount is simply a percentage of the gross receipts from broadcasting revenue. That does not make it a tax on the broadcast. The contention that Florida could not impose the tax on an out-of-state-transaction if no broadcast occurred likewise proves nothing. Florida has not tried to impose a tax in that situation, and whether it could do so under the Commerce Clause is not at issue. Again, Top Rank deviates far from the facial challenge it brought below.[8]

Finally, the fact that Top Rank now claims to receive a "license fee" rather than a flat purchase price is simply not relevant to the issue of whether § 548.06 is facially valid. Facts peculiar to Top Rank have not been, and are not now, at issue.

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[8]As illustrated by its further insistence that Florida cannot tax the promotion of an event occurring in Nevada. Pet. 20 (citing Great Atl. & Pac. Tea Co. v. Grosjean, 301 U.S. 412 (1937)). This Commerce Clause issue is not fairly within the scope of the Question Presented, was not pleaded in the complaint, and was not argued as a basis for reversal to the First District. Neither Top Rank nor Showtime, whose brief argues for summary reversal on this point, explain how the issue is properly before this Court. The validity of a tax on an out-of-state event is addressed in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), and its progeny. See, e.g., Goldberg v. Sweet, 488 U.S. 252, 260 n. 12 (1989) (citing cases). Neither court below was asked to address this Commerce Clause issue.

II. THERE IS NO CONFLICT AMONG THE FEDERAL COURTS OF APPEALS OR STATE SUPREME COURTS ON THE QUESTION PRESENTED, AND THIS COURT'S INTERVENTION IS NOT WARRANTED.

Top Rank demands the Court's immediate intervention to resolve the status of state taxes "on boxing programming." It claims that Georgia, Oregon and California statutes are "functionally identical," that the Georgia and Oregon statutes "directly tax" promoters, and that the First District's decision will now cause great disarray in the law. These assertions do not withstand scrutiny. Not one of the decisions addressing these statutes was rendered by a state supreme court or a federal court of appeals, and all can be readily distinguished from the First District's decision. Moreover, Top Rank's palpable attempt to short-circuit Florida's administrative procedures threatens the legitimate interest of all States in sound fiscal planning, an interest this Court has long recognized.

A. There Is No Conflict In Decisions That Would Merit This Court's Review.

The decision of the court in Showtime Networks, Inc. v. Georgia State Boxing Comm'n, No. 1999 CV04184, slip op. (Ga. Super. Ct. Nov. 23, 1999), stated that the tax at issue was imposed on "telecast promoters," defined by statute as "any promoter who shows or causes to be shown in this state a closed circuit telecast of any professional boxing event, whether or not the telecast or event originates in this state." O.C.G.A. § 43-8A-1(23) The Showtime decision noted, however, that "[p]laintiff is not a boxing promoter but is a seller/distributor of pure entertainment," and further, that "[t]here is a distinction between the match itself and the telecast of the boxing event. In this case the sale of this broadcast was pure entertainment for its viewers."

Pet. App. 36a and n.3 (citation omitted). Top Rank, as a boxing promoter, does not stand in the shoes of Showtime.

In TVKO v. Howland, 15 Or. Tax 335, (2001), aff'd, 73 P.3d 905 (Or. 2003), the State of Oregon attempted to tax TVKO, a subdivision of Home Box Office. The Oregon law at issue defined promoter as

> [a] person who holds the distribution rights to a pay-per-view telecast of a boxing or wrestling event that occurs within or outside this state and who sells the ability to receive the telecast to a person who charges an admission for the right to view the telecast in this state.

O.R.S. 463.015(13)(b). The Oregon tax court found that TVKP was a producer and distributor of television programming, not a promoter of boxing, and the televising of a boxing match was not promotion. The tax court invalidated the tax because it interfered with the First Amendment right to produce and distribute television programming. On appeal, the Oregon Supreme Court did not consider the correctness of the tax court's ruling but rather whether the tax court improperly limited the declaratory relief afforded the plaintiff.

Similarly, in U.S. Satellite Broadcasting Co. v. Lynch, 41 F. Supp. 1113 (E.D. Cal. 1999), the district court found the California Boxing Act imposed a tax on telecasts payable by the telecaster, not by the fight promoter. Id. at 1120. As the court observed, "plaintiff is not a boxer or boxing promoter; plaintiff sells entertainment, the moving images and sound recorded at boxing and other combative contests." Id. at 1121.

The decision of the First District does not conflict with any of these cases. Not one of them involved an effort to tax a promoter as that term is defined by Florida law. See § 548.002(15), Fla. Stat. (2000). All of them, in fact, distinguish between a promoter of a match and a producer or broadcaster of

a television program about the match. Once more, Top Rank's argument hinges on the unproven (and here irrelevant) assertion that it happens to be a producer of boxing programming for pay-per-view telecast, as well as a promoter. Pet. at 23. This claim simply was not established in the lower courts. Neither court considered Top Rank to be a producer of television programming, and the decision simply does not apply to producers of television programming. Indeed, that would not have been a valid consideration because Top Rank's decision to forego its administrative remedy left it only a facial challenge.

B. The Petition Disregards Florida's Legitimate Interest in Orderly Tax Refund Procedures.

Finally, the demand for this Court's intervention to review what is obviously a very limited decision runs directly counter to the Court's recognition of "the State's interest in stable fiscal planning [as] weighed against its constitutional obligation to provide relief for an unlawful tax." See McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 45 (1990). That critical interest in fiscal stability "is sufficiently weighty to allow States to withhold predeprivation relief for allegedly unlawful tax assessments, providing postdeprivation relief only." Id. at 50. Consistent with this fiscal concern, Florida law requires that a taxpayer who desires to challenge a tax statute must pay the tax and pursue an administrative claim under § 215.26, Fla. Stat., except where a challenge is to the facial constitutionality of the statute. Sarnoff v. Dep't of Highway Safety & Motor Vehicles, 825 So. 2d 351, 357 (Fla. 2002). Moreover, to the extent Top Rank's argument depends on perceived constitutional deficiencies in administrative rule 61K1-1.042 or any other Commission rule, Sarnoff holds that relief must be sought pursuant to § 215.26.

This Court has taken note of Florida's "longstanding" practice under § 215.26 and has found no inadequacy in the postdeprivation remedy provided by that statute. Newsweek, Inc.

v. Florida Dep't of Revenue, 522 U.S. 442, 444 (1998). Beyond any doubt, § 215.26, characterized by the Florida Supreme Court as a non-claim statute, is intended to serve the State's interest in fiscal stability. See State ex rel. Victor Chemical Works v. Gay, 74 So. 2d 560 (Fla. 1954). By presenting issues to this Court that were not--and properly could not have been--litigated in the proceedings below, Top Rank would make Florida's procedural requirements meaningless. Top Rank should be left to its state law remedies, pursuit of which conceivably could avoid further litigation, or at least result in a record suitable for review.

In addition to threatening carefully crafted procedural requirements that all States likely have in place, this case meets none of the criteria for review under Supreme Court Rule 10. Nor is it of national importance. Top Rank, in essence, asks this Court to assume Florida has imposed a tax on producers of television programming. But that is not this case. The decision below simply found that a tax on boxing promoters is not facially unconstitutional. Top Rank elected a limited remedy and now, dissatisfied with the outcome, argues the case it could have presented had it proceeded under § 215.26, Fla. Stat. But Top Rank has demonstrated no error in the decision of the First District, and, accordingly, has presented no basis for review.

CONCLUSION

For the reasons stated, the Court should deny review.

RESPECTFULLY SUBMITTED,

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